

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington
corporation,

Plaintiff,

v.

MOTOROLA, INC., and MOTOROLA
MOBILITY LLC, and GENERAL
INSTRUMENT CORPORATION,

Defendants.

MOTOROLA MOBILITY LLC, and
GENERAL INSTRUMENT CORPORATION,

Plaintiffs/Counterclaim Defendant,

v.

MICROSOFT CORPORATION,

Defendant/Counterclaim Plaintiff.

CASE NO. C10-1823-JLR

DEFENDANTS' MOTION TO FILE
DOCUMENTS UNDER SEAL IN
SUPPORT OF DEFENDANTS'
MOTIONS IN LIMINE

**NOTE ON MOTION CALENDAR:
Friday, October 12, 2012**

DEFENDANTS' MOTION TO FILE DOCUMENTS UNDER
SEAL IN SUPPORT OF DEFENDANTS' MOTIONS IN
LIMINE
CASE NO. C10-1823-JLR

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
Telephone: (206) 676-7000
Fax: (206) 676-7001

I. INTRODUCTION

Pursuant to Western District of Washington Civil Local Rule CR 5(g)(2), Defendants Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility, LLC, and General Instrument Corporation (collectively “Motorola”) respectfully move this Court for leave to file under seal the following:

1. Exhibits 1-4 and 7-12 to the Declaration of Stuart W. Yothers; and
2. Defendants’ Motions In Limine (“Motions”).

II. BACKGROUND

Microsoft Corporation (“Microsoft”) and Motorola entered into a stipulated Protective Order, which was approved by the Court on July 21, 2011. (Dkt. No. 72.) This Protective Order outlines categories of material that should be maintained in confidence, along with procedures for sealing confidential material when included in documents filed with the Court. Specifically, paragraph 1 specifies that:

Confidential Business Information is information which has not been made public and which concerns or relates to the trade secrets ... amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, the disclosure of which information is likely to have the effect of causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained....

Id. at 1-2. This information should be marked as “CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.” *Id.* at 2. Additionally, paragraph 6 specifies that:

(1) Confidential Business Information pertaining to licensing or other commercially sensitive financial information shall not be made available under this paragraph 6 to such designated in-house counsel; the supplier shall designate such Confidential Business Information pertaining to licensing or other commercially sensitive financial information as “[SUPPLIER’S NAME] CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly provide a redacted version of such document that may be disseminated to the two in-house counsel designated under this paragraph 6....

1 *Id.* at 4. Finally, Paragraph 2 of the Protective Order governs the sealing of documents, and states
 2 in relevant part that:

3 During the pre-trial phase of this action, such information, whether submitted in
 4 writing or in oral testimony, shall be disclosed only *in camera* before the Court
 5 and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules
 6 of the United States District Court for the Western District of Washington.

7 *Id.* at 2.

8 Thus, the Protective Order provides that Motorola may request to seal documents by
 9 formal motion pursuant to Rule 5(g) of the Local Civil Rules of the Western District of
 10 Washington. Local Rule CR 5(g)(3) states that:

11 If a party seeks to have documents filed under seal and no prior order in the case
 12 or statute specifically permits it, the party must obtain authorization to do so by
 13 filing a motion to seal or a stipulation and proposed order requesting permission
 14 to file specific documents under seal. The court will allow parties to file entire
 15 memoranda under seal only in rare circumstances. A motion or stipulation to seal
 16 usually should not itself be filed under seal. A declaration or exhibit filed in
 17 support of the motion to seal may be filed under seal if necessary. If possible, a
 18 party should protect sensitive information by redacting documents rather than
 19 seeking to file them under seal. A motion or stipulation to seal should include an
 20 explanation of why redaction is not feasible.

21 Similarly, federal law recognizes that courts should protect trade secrets or other
 22 confidential commercial information by reasonable means, permitting the filing under seal of
 23 documents containing such information. *See* Fed. R. Civ. P. 26(c)(1)(G) and (H) (stating that a
 24 court may require that (1) “a trade secret or other confidential research, development, or
 25 commercial information not be revealed or be revealed only in a specified way” and (2) “the
 26 parties simultaneously file specified documents or information in sealed envelopes...”).

Though courts recognize a general right to inspect and copy public records and documents,
 including judicial records, the United States Supreme Court has stated that this right is limited.
 “[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory
 power over its own records and files, and access has been denied where court files might have
 become a vehicle for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598

(1978). In discussing examples of improper purposes, the Court indicated that courts are not to serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.*

As the Ninth Circuit stated:

The law, however, gives district courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information. See Fed. R. Civ. P. 26(c)(7). Rule 26(c) authorizes the district court to issue “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden.” The Supreme Court has interpreted this language as conferring “broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

Phillips v. General Motors Corp., 307 F.3d 1206, 1211 (9th Cir. 2002).

III. THE PROTECTIVE ORDER BOTH PERMITS AND REQUIRES MOTOROLA TO FILE THIS MOTION FOR LEAVE TO SEAL

In accordance with the Protective Order and the above-referenced authority, Motorola moves to file the following documents under seal for the stated reasons:

A. Exhibits 1-4 and 7-12 to the Declaration of Stuart W. Yothers

Exhibit 1 is a true and correct copy of the August 10, 2012 Rebuttal Report of Matthew R. Lynde, Ph.D., Pursuant to Rule 26(a)(2)(B) (filed under seal). The report, which is designated as “MICROSOFT/MOTOROLA CONFIDENTIAL BUSINESS INFORMATION OUTSIDE ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER,” contains highly confidential Motorola and Microsoft information relating to business and licensing practices and history. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Accordingly, Exhibit 1 should be sealed in its entirety. This document was previously submitted to the Court as Exhibit 46 to the September 5, 2012 Second Declaration of Samuel L. Brenner In Support of Motorola Mobility’s and General Instrument’s Opposition to Microsoft’s Rule 702 Motion to Preclude Testimony By Charles R. Donohoe and Dr. R. Sukumar (Dkt. No. 392), and was ordered sealed by the Court (Dkt. No. 432).

Exhibit 2 is a true and correct copy of excerpts of the transcript of the deposition of Matthew R. Lynde, Ph.D., which was taken under oath in San Francisco, California, on August 31, 2012 (filed under seal). That transcript has been designated "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER." At his deposition, Dr. Lynde testified extensively regarding the content of both his opening and rebuttal expert reports, which Microsoft has designated in their entirety as "MICROSOFT/MOTOROLA CONFIDENTIAL BUSINESS INFORMATION OUTSIDE ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER." Both Dr. Lynde's testimony and the expert reports referenced extensively throughout the course of his deposition disclose highly confidential Motorola and Microsoft information relating to business and licensing practices and history. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Accordingly, Exhibit 2 should be sealed in its entirety. The entire document from which these excerpts are drawn was previously submitted to the Court as Exhibit 38 to the September 5, 2012 Second Declaration of Samuel L. Brenner In Support of Motorola Mobility's and General Instrument's Opposition to Microsoft's Rule 702 Motion to Preclude Testimony By Charles R. Donohoe and Dr. R. Sukumar (Dkt. No. 392), and was ordered sealed by the Court (Dkt. No. 432).

Exhibit 3 is true and correct copy of excerpts of the August 10, 2012 Rebuttal Expert Report of Kevin M. Murphy (filed under seal). The report, which is designated as "ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER," contains confidential Motorola licensing information, and which cites to and discusses confidential Motorola licensing information included in the report of Motorola expert Charles R. Donohoe. That report, which is designated as "CONTAINS CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE ATTORNEYS' EYES ONLY – SUBJECT TO PROTECTIVE ORDER," includes an examination of, and discloses, confidential and non-public financial and business information relating to both Microsoft and Motorola, and relating to licensing and business practices and history. Disclosure of this information to third parties and other party employees not covered by the protective order

1 would have the potential to lead to competitive harm. Accordingly, Exhibit 3 should be sealed in
2 its entirety.

3 Exhibit 4 is a true and correct copy of the transcript of the deposition of Kevin M. Murphy,
4 which was taken under oath in Chicago, Illinois, on August 31, 2012 (filed under seal). This
5 transcript has been designated as "HIGHLY CONFIDENTIAL." During his deposition, Dr.
6 Murphy testified extensively regarding the content of both his opening and rebuttal expert reports,
7 which Microsoft has designated in their entirety "ATTORNEYS' EYES ONLY SUBJECT TO
8 PROTECTIVE ORDER." Moreover, during his deposition, Dr. Murphy discussed confidential
9 information about Microsoft's and Motorola's business and licensing practices and licensing
10 history. Disclosure of this information to third parties and other party employees not covered by
11 the protective order would have the potential to lead to competitive harm. Due to presence of this
12 highly confidential information throughout the transcript, Exhibit 4 should be sealed in its entirety.
13 This document was previously submitted to the Court as Exhibit 39 to the September 5, 2012
14 Second Declaration of Samuel L. Brenner In Support of Motorola Mobility's and General
15 Instrument's Opposition to Microsoft's Rule 702 Motion to Preclude Testimony By Charles R.
16 Donohoe and Dr. R. Sukumar (Dkt. No. 392), and was ordered sealed by the Court (Dkt. No. 432).

17 Exhibit 7 is a true and correct copy of excerpts of the July 24, 2012 Expert Report of
18 Matthew R. Lynde, Ph.D., Pursuant to Rule 26(a)(2)(B) (filed under seal). This report, which
19 Microsoft has designated as "MICROSOFT/MOTOROLA CONFIDENTIAL BUSINESS
20 INFORMATION OUTSIDE ATTORNEY'S EYES ONLY - SUBJECT TO PROTECTIVE
21 ORDER," discloses highly confidential Motorola and Microsoft information relating to business
22 and licensing practices and history. Disclosure of this information to third parties and other party
23 employees not covered by the protective order would have the potential to lead to competitive
24 harm. Accordingly, Exhibit 7 should be sealed in its entirety.
25
26

1 Exhibit 8 is a true and correct copy of a September 18, 2003 presentation delivered to
2 Motorola containing details of InteCap's 2003 study, and bearing Bates numbers MOTO-MS-
3 000237724-48 (filed under seal). This presentation, which is designated "MOTOROLA
4 MOBILITY, INC. CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO PROTECTIVE
5 ORDER," contains confidential information regarding Motorola's market analysis and business
6 practices and strategy. Disclosure of this information to third parties and other party employees
7 not covered by the protective order would have the potential to lead to competitive harm.
8 Accordingly, Exhibit 8 should be sealed in its entirety.

9 Exhibit 9 is a true and correct copy of excerpts of the March 20, 2012 deposition of K.
10 McNeill Taylor, Jr., which was designated Highly Confidential and which was taken under oath in
11 New York, NY (filed under seal). Throughout his testimony, Mr. Taylor disclosed highly
12 confidential information about Motorola's licenses, licensing history, internal business practices,
13 and confidential communications between the parties' respective legal departments. Disclosure of
14 this information to third parties and other party employees not covered by the protective order
15 would have the potential to lead to competitive harm. Due to presence of this highly confidential
16 information throughout the transcript, Exhibit 9 should be sealed in its entirety. The entire
17 deposition transcript from which these pages are excerpted was previously submitted to the Court
18 as Exhibit 1 to the March 30, 2012 Declaration of Kevin J. Post in Support of Defendants' Motion
19 for Partial Summary Judgment (Dkt. No. 230), and was ordered sealed by the court (Dkt. No.
20 294).

21 Exhibit 10 is a true and correct copy of the August 10, 2012 Rebuttal Expert Report of
22 Michael J. Dansky (filed under seal). That report, which Motorola designated as "HIGHLY
23 CONFIDENTIAL – ATTORNEYS' EYES ONLY," includes an examination of, and discloses,
24 confidential and non-public financial and business information relating to both Microsoft and
25 Motorola, and relating to licensing and business practices and history. Disclosure of this
26 information to third parties and other party employees not covered by the protective order would

1 have the potential to lead to competitive harm. Accordingly, Exhibit 10 should be sealed in its
2 entirety.

3 Exhibit 11 is a true and correct copy of excerpts (highlighted by counsel) of the April 10,
4 2012 deposition of Amy A. Marasco, which was designated Highly Confidential, and which was
5 taken under oath in Seattle, Washington (filed under seal). During her deposition, Ms. Marasco
6 testified extensively regarding Microsoft's confidential and non-public financial and business
7 information. Disclosure of this information to third parties and other party employees not covered
8 by the protective order would have the potential to lead to competitive harm. Due to presence of
9 this highly confidential information throughout the transcript, Exhibit 11 should be sealed in its
10 entirety.

11 Exhibit 12 is a true and correct copy of excerpts (highlighted by counsel) of the April 4,
12 2012 deposition of Horacio E. Gutierrez, which was Highly Confidential - Attorneys' Eyes Only,
13 and which was taken under oath in Seattle, Washington (filed under seal). During his deposition,
14 Mr. Gutierrez testified extensively regarding Microsoft's confidential and non-public financial and
15 business information. Disclosure of this information to third parties and other party employees not
16 covered by the protective order would have the potential to lead to competitive harm. Due to
17 presence of this highly confidential information throughout the transcript, Exhibit 12 should be
18 sealed in its entirety.

19 **B. Defendants' Motions In Limine ("Motions")**

20 Motorola respectfully requests that its Motions be filed under seal because of extensive
21 citation to, and description of: (1) confidential internal Motorola and Microsoft documents relating
22 to business and licensing practices and history; (2) expert reports filed in this action by
23 Microsoft's and Motorola's expert witnesses, which the parties have designated as
24 "MICROSOFT/MOTOROLA CONFIDENTIAL BUSINESS INFORMATION OUTSIDE
25 ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER" and "HIGHLY
26

CONFIDENTIAL – ATTORNEYS’ EYES ONLY”; and (3) confidential deposition testimony from this action. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Because this information is contained in the Motions, and in accordance with its responsibilities under the Protective Order, Motorola has marked this document as containing “OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER.” In lieu of sealing all of the Motions, Motorola has redacted only those portions of its Motions that disclose this confidential information. Redactions were made to limit as little information as possible, leaving the remainder available for public review.

IV. CONCLUSION

For the foregoing reasons, Motorola respectfully requests that this Court order that the following documents be filed under seal:

1. Exhibits 1-4 and 7-12 to the Declaration of Stuart W. Yothers; and
2. Defendants’ Motions In Limine.

DATED this 4th day of October, 2012.

Respectfully submitted,

SUMMIT LAW GROUP PLLC

By /s/ Ralph H. Palumbo

Ralph H. Palumbo, WSBA #04751

Philip S. McCune, WSBA #21081

Lynn M. Engel, WSBA #21934

ralph@summitlaw.com

philm@summitlaw.com

lynne@summitlaw.com

By /s/ Thomas V. Miller

Thomas V. Miller

MOTOROLA MOBILITY LLC

600 North U.S. Highway 45

Libertyville, IL 60048-1286

(847) 523-2162

And by

Jesse J. Jenner (*pro hac vice*)
Steven Pepe (*pro hac vice*)
Stuart W. Yothers (*pro hac vice*)
Kevin J. Post (*pro hac vice*)
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036-8704
(212) 596-9046
jesse.jenner@ropesgray.com
steven.pepe@ropesgray.com
stuart.yothers@ropesgray.com
kevin.post@ropesgray.com

James R. Batchelder (*pro hac vice*)
Norman H. Beamer (*pro hac vice*)
Ropes & Gray LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
(650) 617-4030
james.batchelder@ropesgray.com
norman.beamer@ropesgray.com

Paul M. Schoenhard (*pro hac vice*)
Ropes & Gray LLP
One Metro Center
700 12th Street NW, Suite 900
Washington, DC 20005-3948
(202) 508-4693
paul.schoenhard.@ropesgray.com

***Attorneys for Motorola Solutions, Inc., Motorola
Mobility LLC and General Instrument Corp.***

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Arthur W. Harrigan, Jr., Esq.
Christopher T. Wion, Esq.
Shane P. Cramer, Esq.
Calfo Danielson, Harrigan, Leyh & Eakes LLP
arthurh@calfoharrigan.com
chrisw@calfoharrigan.com
shanec@calfoharrigan.com

Richard A. Cederoth, Esq.
Brian R. Nester, Esq.
David T. Pritikin, Esq.
Douglas I. Lewis, Esq.
John W. McBride, Esq.
David Greenfield, Esq.
William H. Baumgartner, Jr., Esq.
David C. Giardina, Esq.
Carter G. Phillips, Esq.
Constantine L. Trela, Jr., Esq.
Ellen S. Robbins, Esq.
Nathaniel C. Love, Esq.
Sidley Austin LLP
rcederoth@sidley.com
bnester@sidley.com
dpritikin@sidley.com
dilewis@sidley.com
jwmcbride@sidley.com
david.greenfield@sidley.com
wbaumgartner@sidley.com
dgiardina@sidley.com
cphillips@sidley.com
ctrela@sidley.com
erobbins@sidley.com
nlove@sidley.com

T. Andrew Culbert, Esq.
David E. Killough, Esq.
Microsoft Corp.
andycu@microsoft.com
davkill@microsoft.com

DATED this 4th day of October, 2012.

/s/ Marcia A. Ripley

Marcia A. Ripley